STATE OF MICHIGAN

COURT OF APPEALS

PONTIAC FIRE FIGHTERS UNION LOCAL 376, Plaintiff-Appellee, v CITY OF PONTIAC, Defendant-Appellant.	UNPUBLISHED November 30, 2006 No. 271497 Oakland Circuit Court LC No. 2006-075367-CL

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant, the city of Pontiac (the city), appeals as of right an opinion and order granting a preliminary injunction in this labor dispute. We affirm.

I. Facts and Procedural History

A collective bargaining agreement (CBA) between the city and plaintiff, Pontiac Fire Fighters Union Local 376 (the union), was in effect from July 1, 2002, through June 30, 2004, and was "extended automatically thereafter on a daily basis until a new contract is negotiated or ordered." Relevant to this litigation, the CBA provides: "During the duration of the Agreement, there will be no layoff of bargaining unit personnel . . . ."[1]

In 2005 and 2006, the city experienced a financial crisis. The city proposed to layoff 28 firefighters or firefighter/paramedics. The union filed a grievance, and filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC). The union also filed this action seeking to prevent the layoffs. The trial court granted the union's request for a

[1] The CBA also provides: "All employees will be laid off in line of seniority and rehired in reverse order. . . ." During the show cause hearing, counsel for the union stated that the no layoff provision was bargained for and added into the 1990 CBA, and that this clause on how layoffs would be conducted had been included in a version of the agreement that predated the 1990 CBA. Counsel asserted the new provision superceded the old.

preliminary injunction, prohibiting the layoffs pending resolution of "all bargaining, contract and statutory procedures . . . ."

"A trial court's decision to grant a preliminary injunction is reviewed for an abuse of discretion . . . ." *City of East Lansing v Dep't of State Police*, 269 Mich App 333, 335; 712 NW2d 519 (2005) (citation omitted). Recently, the Michigan Supreme Court adopted this definition for an abuse of discretion:

> [A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . . When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. . . . [*Maldonado v Ford Motor Co*, 476 Mich 372, ___; 719 NW2d 809, 817 (2006) (internal quotation marks, brackets and citations omitted).]

The Court stated that this new standard is the "default" standard. *Id*.

II. Irreparable Injury

The city asserts that the trial court abused its discretion in granting a preliminary injunction, arguing that the union did not demonstrate that it would suffer an irreparable injury without a preliminary injunction, and had no adequate remedy at law. We disagree.

"An injunction represents an extraordinary and drastic act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Senior Accountants, Analysts & Appraisers Ass'n v City of Detroit*, 218 Mich App 263, 269; 553 NW2d 679 (1996). This Court has identified four factors to consider in determining whether to grant a preliminary injunction:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998).]

While our review of the trial court's decision is for abuse of discretion, the trial court's standard is not so narrowly drawn. "Granting injunctive relief is within the sound discretion of the trial court. The exercise of this discretion may not be arbitrary, but rather must be in accordance with the fixed principles of equity jurisprudence and the evidence in the case." *Jeffrey v Clinton Township*, 195 Mich App 260, 264; 489 NW2d 211 (1992) (citations omitted). To support the grant of this "extraordinary remedy," the trial judge must find that "there exists a real and imminent danger of irreparable injury." *Id.*

This Court has addressed the court rules governing injunctions and found that:

> MCR 3.310(A) provides that an injunction may not be granted before a hearing on the motion is conducted and, further, that the moving party has the burden of establishing that the relief should be granted. Additionally, MCR 3.310(C)(1) declares that an order granting an injunction must set forth the reasons for its issuance. Although it is not compulsory for a trial court to hold an evidentiary hearing before the issuance of an injunction, some formal hearing is required. If a party's entitlement to the injunction can be established in a particular case by argument, brief, affidavits or other forms of nontestamentary evidence, the trial court need not take testimony at the hearing. [Campau v McMath, 185 Mich App 724, 728; 463 NW2d 186 (1990) (citations omitted)].

Here the trial court held a show cause hearing and, based on the parties' arguments in that hearing and the documentary evidence each submitted, the court made the following findings in its order granting the injunction:

> Violation of one of the terms of the collective bargaining agreement impacts Plaintiff's collective bargaining rights. Laying off firefighters would result in about 25% of Defendant's existing firefighters losing their jobs, salary and benefits and create a current hardship that cannot be compensated even if a subsequent arbitration decision would award those laid off a reinstatement of their positions and back wages. In addition, Plaintiff may be irreparably harmed since a reduction in the workforce and the closing of several City fire stations would result in a significant increased risk of harm for the remaining firefighters. Fewer fire fighters [sic] would be available to respond to fires and the closing of stations caused by the lay off would result in the firefighters having to cover a larger territory. The remaining firefighters would thus not be able to respond as quickly as they used to which means that they would be faced with fires that have increased in intensity or size and as a result are more dangerous. The Court finds that all of the foregoing reasons support a finding of irreparable harm to Plaintiff if an injunction should not be issued.

We note that the city presented evidence contradicting the union's claim.[2] However, reviewing the documentary evidence presented by both parties, and giving due deference to the trial judge, we find that a preliminary injunction is within the range of principled outcomes, and the trial court did not abuse its discretion in granting it.

---

[2] The fire chief testified that the great majority of calls to the city's fire department are medical runs, and "[i]n the event the department is at the minimum level of seventeen firefighters on a given day, private ambulance services will be used to respond to medical runs, and the City's firefighters will be used solely for fighting fires." After the layoffs, the fire department will continue to utilize both an incident command system and the "two in two out" rule, which forbids a firefighter from entering a burning structure without another firefighter, and without two firefighters remaining outside the structure. "In addition, the department will continue to assign a safety officer to each fire. The number of firefighters at a fire will not be impacted."

III. Likelihood of Success on the Merits

The city also argues that the trial court abused its discretion in granting the injunction because the trial court erred in finding that the union demonstrated a likelihood of success on the merits of its claims. We disagree.

The Public Employment Relations Act, PERA, MCL 423.201 *et seq*., governs labor disputes between public entities and their employees, such as firefighters. *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, 550; 581 NW2d 707 (1998). Where a public employer or a group of public employees believes an unfair labor practice has occurred, it may submit an allegation, or charge, to the MERC, which under MCL 423.216[3] has exclusive jurisdiction over such a charge. *Id.* A party making an unfair labor practice charge before the MERC may in the interim seek temporary injunctive relief in court. MCL 423.216(h).[4]

Here, regarding count I (breach of contract), we agree with the trial court that the union is likely to prevail on the merits. The CBA provides: "During the duration of the Agreement, there will be no layoff of bargaining unit personnel . . . ." The CBA had not expired. Rather, the CBA was "extended automatically . . . on a daily basis until a new contract is negotiated or ordered."

"When the terms of a contract are unambiguous, their construction is for this Court to determine as a matter of law." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2001). Whether contract language is ambiguous is a question of law reviewed de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The proper interpretation of a contract is also a question of law reviewed de novo. *Id*. "If two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous." *Id.* at 480.

Here, the language of the CBA is unambiguous because there are no terms that irreconcilably conflict with one another. This CBA provision flatly prohibits layoffs: "During the duration of the Agreement, there will be no layoff of bargaining unit personnel . . . ." And the CBA "extended automatically [after June 30, 2004] on a daily basis until a new contract is negotiated or ordered." The union is therefore likely to prevail on the merits of its breach of contract claim.

Next, the city argues that the CBA was terminable at will. The CBA provides: "The terms and provisions of this Agreement shall remain in full force and effect pending agreement

---

[3] MCL 423.216 provides, in pertinent part: "Violations of the provisions of section 10 shall be deemed to be unfair labor practices remediable by the commission . . . ."

[4] MCL 423.216(h): "The commission or any charging party shall have power . . . to petition any circuit court within any circuit where the unfair labor practice in question is alleged to have occurred . . . for appropriate temporary relief or restraining order . . and the court shall have jurisdiction . . .."

upon a new contract." The city argues that under *Pickney*[5] *Community Schools Bd of Ed v Pickney Community Schools Bus Drivers Ass'n, MESPA/MEA/NEA*, 1994 MERC Lab Op 376, such contract language renders the agreement terminable at will. However, this MERC opinion is not binding on this Court. See, e.g., *Electronic Data Systems Corp v Flint Twp*, 253 Mich App 538, 544; 656 NW2d 215 (2002). We find that the contract language quoted above is not a terminable-at-will provision because it merely indicates that the terms of the CBA shall remain in force until there is a new contract, whereas a terminable-at-will provision would provide that the terms would remain in force until terminated. We note that even if the CBA was terminable at will, there is no evidence that the city terminated the CBA.

The city next argues that even if the CBA is not terminable at will, the union did not demonstrate a likelihood of success on the merits of counts I (breach of contract) and II (unfair labor practice) because the MERC will not entertain the issue presented. The city admits that PERA violations "can constitute unfair labor practices . . . over which the Michigan Employment Relations Commission . . . has exclusive jurisdiction. . .," but the city argues that the MERC will not consider the unfair labor practice charge because the CBA provides for resolution of disputes through arbitration. The MERC decisions cited by the city support the argument that the MERC will not entertain an unfair labor practice charge where there is an alleged breach of the CBA and a bona fide dispute over the interpretation of the CBA. See, e.g., *40th Judicial Circuit Court, Lapeer County (Friend of the Court) v Teamsters State, Co & Muni Employees, Local 214*, 2000 MERC Lab Op 350, 356. Even if this argument is correct, however, it affects only count II, the unfair labor practice claim. There is no legitimate dispute over the interpretation of the no-layoff provision of the CBA. Because the CBA unmistakably prohibits layoffs during the duration of the CBA, and because the CBA is extended daily until a new agreement is reached, the union is likely to prevail on the merits of its breach of contract claim (count I).

The city next argues that the union has not demonstrated a likelihood of success on the merits of count II because, absent a unilateral change in a mandatory subject of bargaining, there can be no unfair labor practice. We disagree.

The PERA requires public employers to engage in collective bargaining regarding "wages, hours and other terms and conditions of employment . . . ." MCL 423.215(1); *City of Detroit v Michigan Council 25, American Federation of State, Co and Muni Employees*, 118 Mich App 211, 215; 324 NW2d 578 (1982). "Subjects falling within these terms are called mandatory subjects of bargaining." *Id*. (citations omitted). Other subjects, not falling within the phrase "wages, hours and other terms and conditions of employment," are permissive subjects of bargaining. *Grand Rapids Community College Faculty Ass'n v Grand Rapids Community College*, 239 Mich App 650, 657; 609 NW2d 835 (2000). "Permissive subjects can be unilaterally changed without bargaining." *Id*. (citations omitted). "The determination of what constitutes a mandatory subject of bargaining under the PERA must be decided case by case," but this Court is "guided in [its] analysis by the basic proposition that because public employees

[5] The caption of the opinion in this matter misspells Pinckney as Pickney, although Pinckney is correctly spelled in the body of the opinion.

are restricted from striking, the scope of the bargaining obligation for public employees is to be broadly construed." *Id*. (citations omitted).

Our Supreme Court has held that policy decisions regarding whether to lay off police officers are not mandatory subjects of bargaining. *Local 1277, Metro Council No 23, American Federation of State, Co and Muni Employees, AFL-CIO v City of Center Line*, 414 Mich 642, 665; 327 NW2d 822 (1982). "However, our Supreme Court has found that '[w]hile the initial decision to lay off is not a mandatory subject of bargaining, the impact of that decision is an issue for bargaining.' *Metropolitan Council No 23 v City of Center Line*, 414 Mich 642, 661; 327 NW2d 822 (1982). In reaching this conclusion, the Court specifically referred to cases where layoff proposals were "bargainable to the extent that [they] related to workload and safety." *Id.* at 662." *Detroit Firefighters Ass'n, IAFF Local 344 v City of Detroit*, 271 Mich App 457, ___; ___ NW2d ___ (2006).

Here the union argued and the trial court agreed that the proposed layoffs would impact workload and safety.[6] The trial judge stated:

> Plaintiff may be irreparably harmed since a reduction in the workforce and the closing of several City fire stations would result in a significant increased risk of harm for the remaining firefighters. Fewer fire fighters [sic] would be available to respond to fires and the closing of stations caused by the lay off would result in the firefighters having to cover a larger territory. The remaining firefighters would thus not be able to respond as quickly as they used to which means that they would be faced with fires that have increased in intensity or size and as a result are more dangerous.

There is a reasonable likelihood that the MERC would agree and find an unfair labor practice by the city.[7]

The city next argues that the union did not demonstrate a likelihood of success on the merits of count III (violation of city charter) because the violation of a city charter is not actionable. We agree. Under *Mack v City of Detroit*, 467 Mich 186, 189-190; 649 NW2d 47 (2002), a cause of action for violation of a city charter would contravene the governmental tort liability act, MCL 691.1407,[8] and is therefore not recognized in Michigan. Even though the

---

[6] The union alleged in its complaint that the proposed layoff of 28 firefighters and firefighter paramedics would decrease the number of Fire Department personnel, 112 before the layoffs, to "below the minimum level mandated by the City Charter."

[7] Even if the MERC does not entertain the unfair labor practice charge, there is an unresolved grievance and the CBA allows for arbitration of the grievance. The city admits that the union's grievance will likely go to arbitration. We note that if arbitration occurs, the arbitrator likely will find that the city breached the CBA based on the CBA's language prohibiting layoffs. Accordingly, if the union prevails at arbitration, it will have prevailed on its breach of contract claim.

[8] MCL 691.1407(1) provides, in pertinent part, that "a governmental agency is immune from tort
(continued…)

union did not demonstrate a likelihood of success on the merits of count III, however, it demonstrated a likelihood of success on the merits of count I (breach of contract) and count II.

Finally, the city argues that the union did not demonstrate a likelihood of success on the merits of count IV ("health and safety") because that count fails to state a claim on which relief may be granted. We agree. Count IV merely states that: the number of firefighters at a fire scene will be reduced to unsafe levels; it is likely that the union will prevail on its unfair labor practice charge; the union is without an adequate remedy at law; and it is in the public interest to grant injunctive relief. Pleading the elements required for an injunction, and alleging that firefighters will be endangered does not state an underlying cause of action. An injunction is a remedy, not a cause of action. *Acer Paradise, Inc v Kalkaska Co Rd Comm'n*, 262 Mich App 193, 205; 684 NW2d 903 (2004). Accordingly, the union did not demonstrate a likelihood of success on the merits of count IV.

We agree with the trial court that the union demonstrated a likelihood of success on the merits of at least its breach of contract claim, and we find that the trial court did not abuse its discretion in finding that a real and imminent danger of irreparable harm supported the grant of the injunction.

Affirmed.

/s/ Jessica R. Cooper
/s/ Michael R. Smolenski

(…continued)

liability if the governmental agency is engaged in the exercise or discharge of a governmental function."